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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-657

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN
Appellants,

v.

WILLIAM D. SWACKHAMER,
Secretary of State of the State of Nevada,

and

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervenor,
Appellees.

On Appeal From the Supreme Court of Nevada

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

On November 10, 1978, Appellee William D. Swackhamer, Secretary of State of the State of Nevada, responded to Appellants' Jurisdictional Statement by filing with the Court a Motion to Dismiss or Affirm. In that motion, Appellee urges, *inter alia,* that this matter has become moot because the advisory referendum scheduled for November 7, 1978, which referendum

Appellants sought to restrain by this action,[1] has been held and its results communicated to the public. This memorandum is in response to that argument.[2]

ARGUMENT

The Holding Of The November 7, 1978 Referendum Has Not Rendered This Appeal Moot

A. *The Continuing Taint of an Unconstitutional Referendum on the Ratification of the Equal Rights Amendment and its Pervasive Impact on the Amendatory Process in Nevada are sufficient to overcome Appellees claim of mootness.*

Although the November 7, 1978 referendum has been held and its result communicated to the public, the issue before this Court is not moot because the statute in question has not yet run its course. Section 6 of Chapter 174, Nev. Stat. 1977, requires that the Secretary of State certify the results of the November 7th referendum to the Legislature. Indeed, the results of the referendum are not legally cognizable by the Legislature until such certification occurs. Because Appellee cannot certify the results of the referendum until January 15, 1978 (the date on which the next session of the Nevada Legislature convenes) the requirements of

[1] Appellants also seek a declaratory judgment that the advisory referendum (which was mandated by Chapter 174, Nev. Stat. 1977) is violative of Article V of the Constitution of the United States. Appellants' application to this Court for an injunction restraining the conduct of the referendum pending appeal was denied by Mr. Justice Rehnquist on October 20, 1978 and by the Court as a whole on October 30, 1978.

[2] Appellees' contentions with respect to the merits of this appeal are adequately dealt with by Appellants' Jurisdictional Statement.

Chapter 174 have not been fulfilled and this matter is not moot.

The Equal Rights Amendment continues to remain a viable issue before the Nevada Legislature. The gravamen of Appellants' position is that the advisory referendum has unconstitutionally altered the amendatory process. Any action by the Legislature, or by individual members thereof, to ratify, refuse to ratify, or even to consider the Equal Rights Amendment following certification by the Secretary of State will be tainted by the unconstitutional referendum. The referendum cannot be treated as an isolated event without further ramifications because the taint of the referendum continues to permeate the ratification process and will continue to taint the process so long as the Equal Rights Amendment remains an unresolved issue before the Nevada Legislature without remedial Court action. For that reason, the issues raised by this appeal are not moot.

The continuing impact of the holding of the Nevada Supreme Court on the amendatory process, even beyond the Equal Rights Amendment, is at least as substantial and pervasive as that which this Court found sufficient to prevent the occurrence of mootness in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974). The underlying issue in *McCorkle* was whether striking employees were entitled to receive welfare benefits. Since the strike giving rise to the dispute had terminated and benefits were no longer being received, it was urged that the matter was moot. This Court rejected the mootness claim and held that the availability of welfare benefits to striking workers had a continuous and pervasive impact on collective bargaining relationships in the state of New Jersey far beyond

the single terminated labor dispute. The continuing effect of the unconstitutional referendum on the amendatory process in Nevada is essentially parallel to the continuing impact on collective bargaining relationships in *McCorkle*. By virtue of the decision of the Nevada Supreme Court, an advisory referendum is now available not only with respect to the Equal Rights Amendment, but also in connection with any other proposed constitutional amendment. Thus, as in *McCorkle*, the issue of the constitutionality of the Nevada advisory referendum is not moot. *See also Carroll* v. *President and Commissioners of Princess Ann*, 393 U.S. 175 (1968); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).[3]

B. *The Constitutional Injury for Which Appellants Seek Relief May Be Repeated and Nevertheless Escape Review.*

The interpretation given to Article V by the Supreme Court of Nevada, holding that the advisory referendum is not repugnant to Article V, is now the definitive interpretation in Nevada. The Legislature could, at any time, direct additional advisory referenda (either at special elections or at regularly scheduled general elections). Yet, the substantial period of time required to litigate the issues through the state judicial system and to obtain full review by this Court[4] would make it highly unlikely that relief could be obtained

[3] For a full discussion of the mootness doctrine, *see* Note, The Mootness Doctrine in The Supreme Court, 88 HARV. L. REV. 373 (1974).

[4] It is not sufficient merely to bring the issue to this Court. If Appellees' contention with respect to mootness is correct, this Court must actually hear and decide the constitutional issue before the date of the referendum to prevent mootness from occurring.

before a challenged referendum was actually held. As this Court has stated, "... elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and unreviewed". *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. at 126. The injury, the holding of an unconstitutional advisory referendum, could recur and yet never be susceptible to review by this Court, either in the context of Nevada's consideration of the Equal Rights Amendment or in the context of the Nevada Legislature's consideration of any other proposed amendment to the Constitution. The mootness doctrine cannot properly be invoked because the instant constitutional violation is of the sort which is "capable of repetition yet evading review". *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330, 333, n.2 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, n.5 (1973).

CONCLUSION

For these reasons, the matter is not moot and this Court should note probable jurisdiction of this appeal. Should this Court determine that the matter is moot, Appellants request, in accordance with the Court's practice, that the judgment be vacated and the case remanded to the state court for appropriate disposition.[5]

Respectfully submitted,

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[5] *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).